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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 313

THEODORE D. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the District of Columbia (R. 4-5) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 13-15) is reported at 190 F. 2d 22.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1951 (R. 16). A petition for re-

hearing was denied on July 12, 1951 (R. 17). The petition for a writ of certiorari was filed on September 11, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

The "Policemen's and Firemen's Relief Fund" was originally established by Congress to provide policemen and firemen of the District of Columbia, who are injured or die in line of duty, with a broad system of relief by way of medical and hospital care and treatment, workmen's compensation and retirement and pension privileges. Congress later extended the Fund's comprehensive benefits to United States Park Policemen employed by the Department of the Interior.

The question presented is whether a United States Park Policeman, who becomes entitled to these benefits because of injuries sustained by him in line of duty when accidently shot by a fellow policeman, may also recover damages against the United States under the Federal Tort Claims Act on the theory that the benefits of the Fund are not "federal" but "local" in nature.

STATUTES INVOLVED

1. 28 U. S. C. 1346(b), formerly part of the Federal Tort Claims Act, is set forth in the Appendix, *infra*, p. 10.

2. The pertinent provisions of the Act of September 1, 1916 (39 Stat. 676, 718), which created the

"Policemen's and Firemen's Relief Fund" for District of Columbia policemen and firemen, are set forth in the Appendix, infra, pp. 10-12.

3. The pertinent provisions of the Act of May 27, 1924 (43 Stat. 174, 176), which extended the benefits of the 1916 Act to United States Park Policemen, are set forth in the Appendix, *infra*, p. 12.

STATEMENT

This is an action for damages under the Federal Tort Claims Act for personal injuries sustained by a United States Park Policeman in the course of his employment (R. 2).

On September 18, 1946, at about 11:00 P. M., "while engaged in the regular pursuit of his employment," petitioner arrested two men (R. 2). The two prisoners broke away and petitioner pursued them (R. 3). A fellow Park Policeman, also in the employ of the Department of the Interior, joined in the pursuit and shot petitioner under the mistaken impression that he was one of the fugitives (R. 3, 6). Petitioner sustained serious and disabling injuries (R. 3).

For those injuries he applied for and has been receiving "his rightful benefits" from the Policemen's and Firemen's Relief Fund (Pet. 2).[1] On

[1] See copy of the ruling of the Comptroller General (Appendix, *infra*, pp. 12-14) showing that petitioner was retired under the 1916 Act as of June 1, 1947 and has been receiving from the Fund disability retirement pay amounting to one-half of his annual salary of $3994. Information obtained from the District of Columbia Auditor's Office shows that petitioner has already received more than $6,000 in retirement pay from

February 24, 1950, long after his eligibility for these benefits had been confirmed and almost 3½ years after the accident, petitioner instituted the instant action under the Federal Tort Claims Act (R. 2-4). The complaint alleged that he was recklessly and negligently shot by the other Park Policeman (R. 3).

The United States filed a motion to dismiss for failure to state a cause of action (R. 4). This motion was granted by the district court (R. 5). On appeal, the court below pointed out that petitioner was entitled to the benefits of the broad system of relief provided by the Fund in the form of medical and hospital care and treatment, pensions and retirement (R. 15). And, applying this Court's decision in *Feres* v. *United States,* 340 U. S. 135, the availability of this comprehensive scheme of benefits for injuries incurred in line of duty was held to preclude additional relief under the Federal Tort Claims Act (R. 14-15). The judgment of the district court, dismissing the complaint, was accordingly affirmed (R. 16).

ARGUMENT

Petitioner does not challenge the principle that a federal employee's eligibility for workmen's compensation, paid leave, medical and disability pension benefits by necessary implication precludes

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the Fund and that he is now receiving monthly payments of $181.26 from the Fund. These payments are in addition to the medical, surgical and hospital expenses paid for him by the Fund.

his recovery of additional damages under the Federal Tort Claims Act or any other appropriate jurisdictional act for injuries sustained in the performance of his duty. Petitioner fully recognizes that this "broad general principle * * * [has been] * * * consistently adhered" to since *Dahn* v. *Davis*, 258 U. S. 421, and has been recently reaffirmed by this Court in *Feres* v. *United States*, 340 U. S. 135 (Pet. 7). Congress, too, has explicitly reaffirmed this basic principle with respect to the great body of federal civilian employees covered by the Federal Employees Compensation Act, which now contains in express terms the former implied prohibition against suing the United States under any applicable jurisdictional statute for service-incurred injuries and limits them to their compensation, paid leave, retirement and disability pension benefits and other administrative remedies. 5 U. S. C., Supp. IV, 757(b), 63 Stat. 861.[2] But even without the addition of such an express prohibition, it is settled that the same limi-

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[2] Whether the Federal Employees Compensation Act covers the Park Police is a question which, as pointed out by the court below, need not be reached "in disposing of this case" (R. 14). In this connection, it must be noted that the letter from the Bureau of Employees' Compensation, reprinted in the Petition at page 11, expressly stated that it was "not a decision" but a notice intended to afford petitioner "an opportunity to present * * * further evidence * * * before a decision is made" as to his eligibility for Compensation Act benefits. In any event, if petitioner is ineligible for those benefits it is apparent that such ineligibility would be due to his eligibility for the equally comprehensive benefits made available to him by Congress through the Policemen's and Firemen's Relief Fund.

tation is implicit and applies to all federal employees, military as well as civilian. *Feres* v. *United States, supra; Mandel* v. *United States,* 191 F. 2d 164 (C. A. 3); *Johansen* v. *United States,* 191 F. 2d 162 (C. A. 2); *Posey* v. *Tennessee Valley Authority,* 93 F. 2d 726 (C. A. 5). *Contra: Johnson* v. *United States,* 186 F. 2d 120 (C. A. 4).

While recognizing the force of the principle limiting employees to their compensation, paid leave and other administrative remedies, petitioner attempts to avoid its impact by arguing that the principle applies only where the administrative benefits are "federal" in nature and that here the administrative benefits of the Fund are not "federal" but "local." Even if we accept petitioner's assumption that the benefits must be "federal", the short answer to his contention is that the benefits of the Fund, when applied to petitioner, who is a "federal" not a "local" employee, are, as the court below viewed them, "federal" in nature (R. 14-15; Pet. 6). In addition, the question as to the nature of the benefits of the Fund, the operation of which is limited to employment within the District of Columbia,[3] has already been decided by the Court

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[3] The fund was created originally for policemen and firemen of the District of Columbia. Even as applied to the United States Park Police, the benefits do not go beyond the District of Columbia inasmuch as the Park Police have "the same powers and duties as the Metropolitan police of the District" and are provided by the United States Government for service only "in the District of Columbia." District of Columbia Code (1940 ed.), Sec. 4-201. Increases in the salaries of Park Policemen have been authorized by Congress so as to "conform

of Appeals for the District of Columbia Circuit and does not, we submit, warrant review here.

1. While the Fund was originally created for the benefit of the policemen and firemen of the District of Columbia, it is significant that it was the Congress of the United States that established this Fund for their benefit. In any event, no matter what view is taken of the Fund with respect to Metropolitan Police, there can be no doubt that Congressional extension of its benefits in 1924 to federal employees in the Park Police was necessarily based on the assumption that the Fund was a federal one at least as far as those employees were concerned. Recognition of this distinction in the Fund's availability to District of Columbia employees, on the one hand, and federal employees, on the other, demonstrates the error in petitioner's insistence that the decision below conflicts with the same court's earlier opinion in *Wham* v. *United States,* 180 F. 2d 38. The *Wham* case, as observed by the court below in the instant case (R. 15), involved a Metropolitan policeman—"a person not employed by the Federal Government." It is on that basis that the court below properly distinguished the *Wham* case.[4]

That the fund is a federal one is made even more

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with the increased cost of living in the District of Columbia." Act of July 14, 1945, 59 Stat. 470.

[4] If that distinction should be viewed as insufficient to reconcile the *Wham* case with the present one, it is apparent that the *Wham* case must be regarded as having been overruled in principle by the instant case.

apparent by the fact that the Comptroller General of the United States authorizes payments from the Fund and directs the District commissioners in their administration of the Fund. See *e.g.*, 28 Comp. Gen. 498; 29 Comp. Gen. 20. Indeed, the Comptroller General has made an express ruling as to the specific amount due petitioner under the Fund.[5] We submit that the direct control exercised by the Comptroller General in this case compels the conclusion that payments from the Fund are actually federal expenditures.

2. Despite the fact that the Fund is a federal one, its operation is, as noted above, limited to the District of Columbia. The only question raised by the petition involves not a construction of the Federal Tort Claims Act—which of course is nationwide in its application—but an interpretation of the 1916 statute which created the Fund for District policemen and firemen and for Park Police serving in the District of Columbia. Absent an unusual showing of importance, this Court normally declines to review interpretations by the Court of Appeals for the District of Columbia Circuit of statutes limited in their operation to the District of Columbia. See *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285; *American Security Co.* v. *District of Columbia*, 224 U. S. 491, 494; Robertson & Kirkham, *Jurisdiction of the Supreme Court*

[5] A copy of this ruling is set forth in the Appendix, *infra*, pp. 12-14.

of the United States (1951 ed. by Wolfson & Kurland), Sections 157, 360. Since the 1916 statute is so limited, we submit that the decision below does not warrant review here.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.
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Assistant Attorney General.
PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys.

OCTOBER 1951.

APPENDIX

1. 28 U. S. C. 1346(b), formerly part of the Federal Tort Claims Act, provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The Act of September 1, 1916 (39 Stat. 676, 718) provides in pertinent part:

> SEC. 12. That from and after the passage of this Act the funds now authorized by law and known as the "Police relief fund" and the "Firemen's relief fund" shall be designated and known as the "Policemen and firemen's relief fund, District of Columbia."
>
> The said fund shall consist of all fines imposed by the Commissioners of the District of Columbia upon members of the police and fire departments of said District by way of discipline; all rewards, proceeds of gifts, and

emoluments that may be received by any member of said departments (for extraordinary services), except such part thereof as the said commissioners may allow to be retained by members of said departments; a deduction of one and one-half per centum of the monthly salary of each member of said departments; donations; and the net proceeds of sales of unclaimed property in the custody of the property clerk of the police department; all of which shall be paid into the Treasury of the United States to the credit of the "Policemen and firemen's relief fund, District of Columbia," herein provided for; and should the said fund at any time be insufficient to defray the expenditures hereinafter provided for, the Commissioners of the District of Columbia, in that event, are authorized, and it shall be their duty, to direct the collector of taxes of said District, and it shall be the duty of the said collector, pursuant to such direction, to pay into the Treasury of the United States, out of the general revenue of the District of Columbia collected by him, to the credit of the said "Policemen and firemen's relief fund, District of Columbia," such sums as may be necessary from time to time to meet deficiencies in said fund. The moneys to the credit of the said fund shall be available for appropriation by Congress annually only for expenditure on requisitions of the said commissioners for the purposes set forth in this Act, and all expenditures from said fund shall be made and accounted for in the same manner as other expenditures of the government of

the District of Columbia are made and accounted for.

3. The Act of May 27, 1924 (43 Stat. 174, 176) provides in pertinent part:

> SEC. 7. That under and in accordance with section 12 of the Act entitled "An Act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30, 1917, and for other purposes," approved September 1, 1916, as amended, members of the United States park police force shall be entitled to all the benefits of relief and retirement therein authorized upon the payment by each member into the policemen and firemen's relief fund, District of Columbia, of an amount equal to 1½ per centum of the total basic salary received by him since September 1, 1916, as a member of such United States park police force, and as a watchman of the United States in any public square or reservation in the District of Columbia: * * *

4. Ruling of the Comptroller General:

COMPTROLLER GENERAL OF THE UNITED STATES
Washington 25

B-72760 Feb. 20, 1950

Honorable John Russell Young, President
Board of Commissioners of the
District of Columbia

MY DEAR MR. YOUNG:

Reference is made to your letter of December 23, 1949, requesting decision whether the Commis-

sioners of the District of Columbia are authorized to increase the relief payments to T. D. Lewis, former member of the United States Park Police, who was retired by reason of disability on June 1, 1947, and granted relief under the act of September 1, 1916, 39 Stat. 676, 718, as amended, in the amount of one-half of his salary of $3,668.97 at date of retirement, or $1,834.44 per year.

It is stated by you that, during the period July 1, 1946, to May 31, 1947, the claimant was assigned to special service in the Department and by reason of the provisions of the act of June 19, 1946, 60 Stat. 261, claims that the basic salary paid him should have been increased in accordance therewith from June 19, 1946, to May 31, 1947, to the salary rate of $3,994. As indicated in your letter, the claimant presented a claim to this Office for the difference in his gross salary, and by settlement of May 19, 1949, payment was authorized to be made to him of a net amount of $276.64, which sum included an adjustment in lump-sum leave payment.

The said act of June 19, 1946, provides, in effect, that the special allowances previously authorized to members of the Metropolitan Police force and United States Park Police force should thereafter be considered as increases in the "basic salaries" of such police. Likewise, the increases granted by Public Law 151, 59 Stat. 470, and Public Law 491, 60 Stat. 480, constitute increases in their basic salaries. Accordingly, all such increases should have been taken into consideration in computing the salary to be paid Mr. Lewis thereafter up to the time and upon the date of his retirement, and such gross salary should be used for the computa-

tion of the relief payments to him, under the 1916 statute, *supra,* retroactive from the date of his retirement, that is, June 1, 1947.

Sincerely yours,

(Signed) LINDSAY C. WARREN,
Comptroller General of the United States

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 313.

THEODORE D. LEWIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR REHEARING ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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